Brevard Achievement Center, Inc. *and* Transport Workers Union of America, Local 525, AFL–CIO. Case 12–RC–8515

September 10, 2004

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN SCHAUMBER, WALSH, AND MEISBURG

On July 27, 2000, the Regional Director for Region 12 issued a Decision and Direction of Election, in which she found appropriate the petitioned-for unit of janitors, custodians, and leadpersons—including the disabled individuals, whom she found to be statutory employees—employed by the Employer at its Cape Canaveral Air Station facility in Florida. In accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, and the Petitioner filed a brief in opposition. On August 23, 2000, the Board granted the Employer's request for review. Thereafter, the Employer and Petitioner filed briefs on review.[1]

Having carefully reviewed the entire record in this proceeding, including the briefs on review, we conclude, in agreement with the Employer, that the disabled workers at the Employer's facility are not "employees" within the meaning of Section 2(3) of the Act.

[1] The Petitioner also filed a Renewed Motion to Reopen the Record, by which it sought to present alleged newly-discovered evidence bearing on the disabled workers' employee status. We deny the Petitioner's motion. Section 102.65(e) of the Board's Rules and Regulations provides that a party may, "because of extraordinary circumstances, move after the close of the hearing for reopening of the record." That section additionally provides that the motion to reopen must specify the error alleged, the prejudice alleged to result from the error, the additional evidence sought to be presented and the reason why it was not presented previously, and the result it would require if adduced and credited.

We note initially that all but one of the documents the Petitioner sought to introduce related to occurrences that post-dated the hearing in this proceeding. Such evidence does not provide a basis for reopening the record. See *A & J Cartage, Inc.*, 309 NLRB 319, 319 fn. 2 (1992). With respect to the evidence pre-dating the hearing—a written report instructing "employee" Heilman to re-clean a particular area of the facility – the Petitioner failed to demonstrate why the evidence was not presented previously and, more importantly, that acceptance of the evidence would produce a result different from the one we reach here. In that regard, we note that the report does not indicate the imposition of any discipline as a result of Ms. Heilman's allegedly inadequate cleaning, nor does the report provide any insight as to the probable treatment of a nondisabled worker under similar circumstances.

Facts

Brevard Achievement Center (BAC) is a nonprofit corporation whose mission is to assist adults with severe disabilities to become independent members of the community, by providing them with training, education, and rehabilitative services. BAC provides a supported community living program for disabled individuals and three vocational programs: adult day training (formerly known as a sheltered workshop**);** job placement and related support services for disabled persons in private sector jobs**;** and work and rehabilitation opportunities for disabled individuals at nine jobsites where BAC provides services under contracts with agencies of the Federal Government pursuant to the Javits Wagner O'Day Act (JWOD Act). See 41 U.S.C. § 46 et seq.

The JWOD Act provides a framework through which organizations may compete for and obtain federal contracts, but only if at least 75 percent of the "man-hours of direct labor" on the contract are performed by individuals with "severe disabilities." The latter term is defined as

> [a] person other than a blind person who has a severe physical or mental impairment (a residual, limiting condition resulting from an injury, disease, or congenital defect) which so limits the person's functional capacities (mobility, communication, self-care, self-direction, work tolerance or work skills) that the individual is *unable to engage in normal competitive employment over an extended period of time.*

41 C.F.R. § 51–1.3 (emphasis added).

Since 1997, BAC has maintained a JWOD contract for the provision of janitorial services at the Cape Canaveral Air Station. In connection with this contract, BAC offers work rehabilitation opportunities to about 53 severely disabled individuals—whom BAC terms "clients." As required by the JWOD Act, BAC identifies potential program participants through a process in which the nature and extent of their disabilities are evaluated and documented, and a determination is made and certified that each client is "severely disabled" within the meaning of the JWOD Act.[2] Approximately 80 to 85 percent of the clients are either mentally impaired or have severely disabling mental illnesses. Some have multiple disabilities. In addition, BAC employs five nondisabled lead-

[2] In accordance with the requirements of the JWOD Act, BAC maintains documentation from a qualified doctor or psychiatrist that identifies each client's disability. Under these circumstances, whether BAC President and CEO Dayle Olson was able to identify at the hearing the precise diagnosis of each of BAC's disabled clients has no bearing on the clients' actual status as severely disabled individuals, contrary to our dissenting colleagues' suggestion.

persons and two nondisabled regular employees on the Cape Canaveral Contract.[3]

While all of BAC's workers perform the same janitorial and custodial tasks, work the same hours, receive the same benefits, and, with the exception of the leadpersons, earn the same wages, BAC's clients work under an umbrella of training, counseling, and other rehabilitation services which distinguish them from BAC's nondisabled employees in many important respects. Specifically, a trainer works at BAC's Cape Canaveral location 3 days per week teaching new clients the duties they are expected to perform**,** and training those existing clients whose performance has regressed. In addition, a mental health counselor is present every day at the facility providing counseling, problem-resolution, and crisis-intervention services to BAC's clients on an as-needed basis. Clients also receive assistance with daily-living activities such as shopping, paying bills, and preparing meals. BAC also provides financial assistance for outpatient mental health services for its disabled clients when such services are not covered by the clients' available health insurance coverage.

BAC's clients, unlike the Company's nondisabled employees, perform their duties under a supervisory structure designed to maximize the rehabilitative and training aspects of the program. Thus, nondisabled workers are subject to a progressive discipline procedure, while the clients are not.[4] Clients are also exempt from discipline for any conduct related to their disabilities. Similarly, although BAC assigns its clients and nondisabled employees the same amount of work each day and expects a certain level of quality (such that the leadpersons may direct them to repeat a particular task if it is not performed adequately initially), the record reflects that clients are permitted to work at their own pace. Further**,** if a client forgets his or her responsibilities, BAC sends out a trainer to correct the problem. One of BAC's leadpersons testified about specific instances in which disabled clients received one-on-one assistance from the trainer for the duration of their tenure with BAC. The record also revealed that clients who failed to learn their assigned tasks were not terminated or removed from the program but instead were assigned to a new team.

BAC evaluates clients at least annually to determine if they have progressed sufficiently to work in a competitive employment environment. Under the JWOD Act, those who attain that goal no longer qualify for "severely disabled" status, and Olson testified that clients routinely make this transition.

The Regional Director's Decision

The Regional Director found that the disabled clients' working conditions mirror those in the private sector, and that their relationship with BAC is "typically industrial" in nature. Accordingly, the Regional Director concluded that the disabled workers are "employees" within the meaning of Section 2(3) of the Act. For the reasons that follow, we find, contrary to the Regional Director, but consistent with longstanding Board precedent, that the disabled workers are not statutory employees and, accordingly, they should be excluded from any unit found appropriate.

Analysis

I. THE PRIMARILY REHABILITATIVE/PRIMARILY ECONOMIC STANDARD

For nearly half a century, the Board has declined to assert jurisdiction over employment relationships, such as sheltered workshops or rehabilitative vocational programs, which are primarily rehabilitative in nature. Citing the nonprofit status of the employers and the rehabilitative purpose of the relationship, the Board initially concluded that it lacked jurisdiction over the employers in question.[5] In response to the 1974 Healthcare Amendments, the Board began asserting jurisdiction over nonprofit employers, but held that it would not assert jurisdiction over disabled individuals working in sheltered workshop arrangements that were primarily rehabilitative in nature.[6] Thus, although the Board's focus shifted from the employer to the disabled individuals, the result remained the same: the Board would not assert jurisdiction over relationships that were primarily rehabilitative.

The Board summarized these developments in *Goodwill Industries of Tidewater*[7] and *Goodwill Industries of Denver*,[8] which explicated the case-by-case factual

[3] Prior to 1997, IRC, a for-profit corporation, performed the janitorial and custodial work at the Cape Canaveral Air Station pursuant to a contractual arrangement that was not governed by the JWOD Act. The nondisabled individuals hired by the Employer, including the 5 leadpersons, previously performed the same janitorial work at the Cape Canaveral station under the predecessor contractor, IRC.

[4] The uncontradicted testimony of BAC's president, Dayle Olson, indicates that BAC follows a progressive disciplinary system with respect to its few nondisabled workers but does not do so with regard to the disabled clients. Rather, Olson testified that in the event of a problem with a client's conduct, the employment and training coordinators and other professional staff intervene and attempt to discern both the cause of the problem and an appropriate solution to correct the problem.

[5] *Sheltered Workshops of San Diego*, 126 NLRB 961 (1960) (declining to assert jurisdiction over nonprofit sheltered workshop whose "essential purpose is to provide therapeutic assistance rather than employment.").

[6] *Goodwill Industries of Southern California*, 231 NLRB 536 (1977).

[7] 304 NLRB 767, 768 (1991).

[8] 304 NLRB 764, 765 (1991).

analysis applied to assess whether disabled individuals working in a primarily rehabilitative setting are statutory employees.[9] In determining whether such individuals are statutory employees, the Board examines the nature of the relationship between the individuals and their employer. If that relationship is guided primarily by business considerations, such that it can be characterized as "typically industrial," the individuals will be found to be statutory employees; alternatively, if the relationship is primarily rehabilitative in nature, the individuals will not be found to be employees. In conducting this analysis, the Board examines numerous factors including, inter alia, the existence of employer-provided counseling, training, or rehabilitation services; the existence of any production standards; the existence and nature of disciplinary procedures; the applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the same facility); and the average tenure of employment, including the existence/absence of a job-placement program.

In *Goodwill of Tidewater* and *Goodwill of Denver*, the Board concluded, on facts similar to those in this case, that disabled individuals who were performing janitorial and merchandise-stocking work at government military bases pursuant to contracts obtained by the employers under the JWOD Act were not statutory employees. In *Goodwill of Denver*, the Board's conclusion that the disabled "client/trainees" were not "employees" was premised primarily on the following facts: the employer permitted the client/trainees to work at their own pace and did not subject them to production quotas or discipline for insufficient production; the employer rarely imposed discipline and instead emphasized counseling and/or transfers to more appropriate positions at other Goodwill locations; the employer conducted both initial and continuing evaluations of the client/trainees as part of its rehabilitation program; the employer provided rudimentary training on such topics as interacting appropriately with staff members and following instructions; the employer employed a full-time trainer, who frequently transported the client/trainees to and from work; and the employer employed two full-time job-placement specialists for the purpose of placing the client/trainees in competitive outside employment.

For similar reasons, the Board also found that the employer's "client/employees," a classification of less severely disabled workers performing the same janitorial and stocking services, could not be considered statutory employees. Id. at 766. Although most of the client/employees did not receive the employer's counseling and training services, the Board emphasized that, as with the client/trainees, the employer meted out discipline only in extreme circumstances (relying instead on counseling or potential transfers) and permitted the client/employees to work at their own pace. Id.

In *Goodwill of Tidewater*, the Board similarly concluded that the disabled "clients" were not employees within the meaning of Section 2(3) of the Act. In finding the clients' relationship with the employer to be primarily rehabilitative in nature, the Board relied principally on evidence that the clients were permitted to work at their own pace and were not subject to production quotas or discipline for insufficient production. The Board also emphasized that the clients, although subject to the same work rules as nondisabled workers, were subject to a different standard of discipline—i.e., they typically received counseling in lieu of discipline, except in the most extreme circumstances. Moreover, in addition to typical supervision, the clients were provided with access to a trainer, who assisted them with their training programs and monitored their progress. Finally, the clients were provided supplemental support in the form of a work adjustment program, through which they learned appropriate workplace behavior and socialization skills.[10]

II. THE PRIMARILY REHABILITATIVE STANDARD IS ROOTED IN THE ACT AND CONGRESSIONAL INTENT

As indicated above, the Board has held that if disabled individuals are in a "primarily rehabilitative" relationship with their putative employer, they are not statutory employees. That approach is consistent with the overall purpose and aim of the Act. In Section 1 of the Act, Congress found that the strikes, industrial strife and unrest that preceded the Act were caused by the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership . . . ."[11] To remove the burden on interstate commerce caused by this industrial unrest, Congress extended to and protected the right of employees, if they so choose, to organize and bargain collectively with their employer," encouraging the "friendly adjustment of industrial disputes arising out of differ-

[9] In these cases, the Board found that the disabled individuals were not employees. Compare *Arkansas Lighthouse for the Blind*, 284 NLRB 1214, 1216 (1987) (finding statutory employee status where relationship was not primarily rehabilitative), enf. denied 851 F.2d 180 (8th Cir. 1988); *Lighthouse for the Blind of Houston*, 244 NLRB 1144 (1979), enfd. 696 F.2d 399 (5th Cir. 1983) (same).

[10] Through this program, the clients' trainers, supervisors, and referring agencies were able to discuss and rectify problems experienced by particular clients in the course of their work, as well as modify the clients' training programs.

[11] Sec. 1.

ences as to wages, hours or other conditions. . . ."[12] As explicated more fully below, the Act thus contemplates a primarily economic relationship between employer and employee, and provides a mechanism for resolving economic disputes that arise in that relationship. Thus, if the relationship is not primarily an economic one, the Act is not intended to apply.[13]

The Board and the courts have looked to these Congressional policies for guidance in determining the outer limits of statutory employee status. In *NLRB v. Bell Aerospace Corp.*,[14] the Supreme Court held that managerial employees, while not excluded from the definition of an employee in Section 2(3), nevertheless are not statutory employees. As the Court explained:

> [T]he Wagner Act was designed to protect 'laborers' and 'workers,' not vice-presidents and others clearly within the managerial hierarchy. Extension of the Act to cover true 'managerial employees' would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management. If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.[15]

Thus, the Court, in construing Section 2(3), went beyond the bare language of the Section. The Court considered the entire Act and its purpose. Although the Court in some cases held that individuals are employees, and held in other cases that they are not, the Court has repeatedly instructed us that the language of Section 2(3) is subject to interpretation, and that such interpretation must take in account the overall policies of the Act.[16] Our interpretation of Section 2(3) is consistent with this admonition and follows the fundamental rule that "a reviewing court should not confine itself to examining a particular statutory provision in isolation."[17]

The Board recently applied these principles in *Brown University*, 342 NLRB No. 42 (2004), and found that graduate student assistants are not statutory employees. These individuals are admitted to university graduate school programs and perform supervised teaching and research as an integral component of their academic program. Because these individuals are primarily students, and their relationship to the university is primarily academic, rather than economic, the Board concluded that it would be inconsistent with the purposes of the Act to find that graduate student assistants are statutory employees.

The Board's longstanding rule that it will not assert jurisdiction over relationships that are "primarily rehabilitative" is consistent with the principles set forth above. The imposition of collective bargaining on relationships that are not primarily economic does not further the policies of the Act. The Act is premised on the view that in arms-length economic relationships, there can be areas of conflict between employers and employees that, if the parties cannot reach agreement, can be resolved through a contest of economic strength in the collective-bargaining process if the employees choose to bargain collectively. This premise is not well suited to a setting that is not primarily economic but primarily rehabilitative. As the Board noted in *Brown*, the principles developed for the industrial setting cannot be "imposed blindly" in other contexts. *NLRB v. Yeshiva University*, 444 U.S. 672, 680–681 (1980).

[12] I Leg. History NLRB 318. See also *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965) (a purpose of the Act is "to redress the perceived imbalance of economic power between labor and management."); I Leg. History NLRA 15 (remarks of Sen. Wagner, 78 Cong. Rec. 3443 (March 1, 1934).

[13] See *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999) ("employee status must be determined against the background of the policies and purposes of the Act. . . . The vision of a fundamentally economic relationship between employers and employees is inescapable."). Our dissenting colleagues say that a "fundamentally economic relationship" really means only that "the relationship must have at least a *basic* economic component, not necessarily a primary one." We think that the Board's decision in *WBAI* means what it says. *Seattle Opera Assn.*, 331 NLRB 1072 (2000), certification affd. 292 F.3d 757 (D.C. Cir. 2002), cited by the dissent, is not to the contrary. The Board there found employee status with respect to auxiliary choristers who performed alongside regular and alternate choristers and were paid $214 for each production in which they performed. Contrary to the implication of the dissent, there was no finding in that case that the primary purpose of the auxiliary choristers was "personal pleasure and satisfaction." Indeed, the Board pointed to the existence of several indicia of the economic nature of the auxiliary choristers' relationship with the employer. To be sure, the Board rejected the position that employee status turns on whether the amount of the compensation paid is sufficient to meet the individual's living expenses. But that says nothing about the employee status of those who work in a "primarily rehabilitative" relationship, as is the case here.

[14] 416 U.S. 267 (1974).

[15] Id. at 284.

[16] See, e.g., *NLRB v. Town & Country Electric Co.*, 516 U.S. 85 (1995) (union organizers are covered by the Act); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (private university professors with policy-making authority are excluded from Act's protection).

[17] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–133 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme.") (citations and internal quotations omitted). See also Sutherland, *Statutory Construction* (5th Ed. 1994) § 46.05: "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed."

Consistent with their mission and the mandatory requirements of the JWOD Act, entities such as BAC provide rehabilitation services to disabled workers, including the full panoply of support services and care described above. They administer their programs, including the provision of rehabilitative work opportunities, for the benefit of their clients, not to maximize profits and secure an economic advantage. The conflicting interests present in traditional, primarily economic employment relationships are absent here.

III. REVIEWING COURTS HAVE CONSISTENTLY AFFIRMED THE PRIMARILY REHABILITATIVE STANDARD

Courts consistently have affirmed the validity of the "typically industrial/primarily rehabilitative" standard articulated in *Goodwill of Denver* and *Goodwill of Tidewater*, and have reiterated the sound policy reasons underlying that standard. Indeed, when the Board has misapplied the "primarily rehabilitative" standard, so as to find employee status, the courts have reversed the Board and found nonemployee status.[18] As the Eighth Circuit Court of Appeals explained:

> The Wagner-O'Day Act assists projects aiding the handicapped by providing a ready market and purchase of the productive efforts engendered by not-for-profit groups seeking to employ handicapped people. The Board's actions and view of its majority [asserting jurisdiction in the case before the court] adopts the opposite view of discouraging the formation and operation of non-profit projects to aid and assist therapeutic and rehabilitative efforts to employ the handicapped.[19]

In our decision today, we reaffirm the primarily rehabilitative standard and apply it to the facts presented.

IV. APPLICATION OF PRIMARILY REHABILITATIVE STANDARD TO THIS CASE

Applying the standard set forth in the *Goodwill* cases discussed above, we conclude that the markedly similar facts of this case compel the conclusion that BAC's relationship with its disabled clients is primarily rehabilitative and therefore that the clients are not statutory employees.[20]

Here, BAC provides training and counseling services to its disabled clients. A trainer works at BAC's facility 3 days per week, providing instruction in skills used in the performance of janitorial and custodial jobs to new clients and those whose performance has regressed. Although this training emphasizes the skills required for the specific jobs at BAC, that fact does not detract from the rehabilitative character of BAC's program. *Goodwill of Tidewater*, 304 NLRB at 768. Moreover, contrary to the Regional Director's finding that this job-related training is the only training offered by BAC, the record reveals that it also provides clients assistance with daily living skills such as check writing, meal preparation, and the coordination of transportation.

In addition to training, BAC, through a mental health counselor who works half-days at its facility, provides counseling and problem-resolution services to BAC's clients on an as-needed basis. Further, BAC maintains a financial arrangement with a mental health care provider to which it refers some clients for medication checks and monitoring, pursuant to which BAC pays for necessary treatment if the client's insurance does not provide coverage. Although, as the Regional Director noted, the record does not establish that the counseling and rehabilitation services are mandatory, the fact remains that BAC makes these rehabilitative services available to its disabled clients only. Indeed, it is certainly consistent with a rehabilitative, rather than profit-seeking, purpose for an employer to provide funding for the mental health care of its uninsured or underinsured disabled workers.

In addition to its provision of training and counseling services, BAC's application of different disciplinary standards to the disabled clients and nondisabled employees evidences the rehabilitative nature of the former relationship. The uncontradicted testimony of BAC President Olson indicates that it follows a progressive disciplinary system with respect to the nondisabled employees but does not do so with regard to the disabled clients. Rather, Olson testified that in the event of a problem with a disabled client's conduct, the employment and training coordinators and other professional staff intervene and attempt to discern both the cause of the problem and an appropriate solution to correct the problem. This approach to discipline is suggestive of the counseling-oriented model of discipline on which the Board placed significant weight in *Goodwill of Tidewater*, supra. Moreover, Olson specifically testified that BAC would not discipline clients for any disability-related conduct.

Although the disabled clients work the same hours, receive the same wages and benefits, and perform the same tasks under the same supervision as the nondisabled em-

[18] *Baltimore Goodwill Industries v. NLRB*, 134 F.3d 227 (4th Cir. 1998); *Davis Memorial Goodwill Industries v. NLRB*, 108 F.3d 406 (D.C. Cir. 1997), denying enf. to 318 NLRB 1044 (1995); *Arkansas Lighthouse for the Blind v. NLRB*, supra.

[19] *Arkansas Lighthouse for the Blind v. NLRB*, supra, 851 F.2d at 185.

[20] The Regional Director did not discuss the Board's *Goodwill* decisions or attempt to distinguish them from the instant case.

ployees, they work at their own pace,[21] and performance problems are dealt with through additional training rather than discipline.[22] These policies support a determination that the relationship between BAC and its clients is primarily rehabilitative, not motivated principally by economic considerations.

Finally, we find, contrary to the Regional Director, that the absence of precise evidence as to each disabled client's tenure of employment does not militate against a finding that the Employer's program is rehabilitative in nature. The JWOD Act under which BAC operates requires that it evaluate its clients for suitability for private employment annually, and BAC presented unrebutted testimony that its clients "routinely" make that transition. That some clients remain with BAC for a period of several years (while others move on within months), supports the rehabilitative quality of BAC's program. Some disabled individuals (e.g., those with more severe disabilities) may require more training or, simply, more repetitive experience, and/or more counseling in working with others and attending to their daily living needs before they can leave the sheltered atmosphere BAC provides.

Response to the Dissent

Our dissenting colleagues say that our decision today is "outside the mainstream" and accuse us of ignoring Supreme Court precedent. They assert that we have rewritten the statutory definition of employee status and "created" an exemption for disabled workers in vocational rehabilitation programs, thereby segregating disabled workers, and relegating them to the economic sidelines and second class status. These broad assertions are as unfair as they are untrue.

In making these accusations, our colleagues labor mightily to obscure the fact that long-standing precedent has firmly established the "typically industrial—primarily rehabilitative" standard that we apply today. We have rewritten nothing, and we have created nothing; we have done no more than faithfully apply this well-established standard to the facts presented in this case.

The dissent attempts to undermine the validity of that standard by claiming that it has been subject to "dramatic" and "unexplained" shifts over time. We do not agree with this characterization. Although the emphasis may have shifted from the putative employer to the putative employee, the unbroken principle is that the relationship is not subject to Board jurisdiction. No amount of rhetoric can disguise the simple fact that the Board has *never* in its history asserted jurisdiction over the primarily rehabilitative relationships that are the subject of this case. It is our colleagues' proposal to jettison that consistent position, not the evolution over time of the *Goodwill* standard, which would work a dramatic change in the law.

In this regard, we stress again that the primarily rehabilitative standard has never been successfully challenged in the courts. Our colleagues cite *Cincinnati Assn. for the Blind v. NLRB*, 672 F.2d 567 (6th Cir. 1982), cert. denied 459 U.S. 835 (1982) and *NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399 (5th Cir. 1983) as instances in which reviewing courts have refused to find that the Board lacks jurisdiction over disabled workers of a sheltered workshop. But in each of these cases, the Board found, and the court agreed, that the relationship was *not* primarily rehabilitative. They therefore provide no support for the dissent's position that statutory employee status exists where, as here, the relationship *is* primarily rehabilitative.[23] In these circumstances, as noted above, the courts have reversed the Board and found that "substantial evidence in the record as a whole does not support the Board's finding that the severely disabled workers in the bargaining unit were 'employees' as defined in the Act."[24] That is, the Board

[21] Contrary to our dissenting colleagues' contention, the record does not contradict President Olson's testimony that the disabled clients are not subject to production standards. Although the leadpersons testified that the disabled clients are *able* to complete their assignments by the end of the day, there is no indication that they are *required* to do so, or that they would be subject to adverse consequences if they failed to do so. Indeed, when asked what would happen if a disabled client failed to complete his/her work by the end of the day, leadperson Smith effectively conceded that she didn't know, as "that [had] never occurred" on her team. Thus, there is no inconsistency between Smith's remarks and Olson's uncontradicted testimony that BAC does not hold its disabled clients to specific production standards, in recognition of the fact that "there [are] going to be some days when [the clients aren't] performing to the best of their ability" and that, at times, they may need some assistance "to get them back on track."

[22] One of BAC's leadpersons also testified that, as a general matter, she tends to check the work of the disabled individuals more frequently than that of the nondisabled workers.

[23] In finding that the Board properly asserted jurisdiction over the individuals at issue in those cases, the courts necessarily rejected the employers' contention that Congress intended an absolute exclusion of sheltered workshops from the Board's jurisdiction. See *Lighthouse for the Blind of Houston*, supra, 696 F.2d at 404 (rejecting contention that Congress "intended to exclude sheltered workshops, such as the Lighthouse, *per se* from the [Act]") (emphasis in original); *Cincinnati Assoc. for the Blind*, supra, 672 F.2d at 571–572 (refusing to find "a blanket exemption from the Act for all sheltered workshops"). Contrary to the dissent's assertion, however, those cases do not establish that "any" exclusion from the Act's jurisdiction for sheltered workshops is inappropriate. Both courts cited with approval the Board's typically industrial/primarily rehabilitative standard for determining when jurisdiction is appropriate. Indeed, the court in *Cincinnati Association for the Blind* found that Congress' failure to alter the Board's typically industrial/primarily rehabilitative standard "suggests that it is satisfied with the present state of affairs." 672 F.2d at 571–572.

[24] *Baltimore Goodwill Industries v. NLRB*, supra, 134 F.3d 227, 230.

failed properly to apply the primarily rehabilitative standard.

Our dissenting colleagues rely on *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), and *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), to support their contention that the absence of an express exclusion in Section 2(3) for disabled individuals working in a rehabilitative setting mandates a finding that they are statutory employees. As we have previously explained above, the Board and the courts do not interpret statutory provisions in isolation from the statutory text in which they are found, nor do they turn a blind eye to the Congressional purpose behind Federal laws. We do not "second guess" Congress. We carry out its intent. In our recent decision in *Brown*, we stated:

> [i]n both *Town & Country* and *Sure-Tan*, the individuals found to be employees worked in fundamentally economic relationships. Moreover, and consistent with our approach [both in *Brown* and here], the Court in both cases examined the underlying purposes of the Act in determining whether paid union organizers and illegal aliens, respectively, were statutory employees.

We have examined and rely upon those same statutory purposes in determining that disabled individuals working in a primarily rehabilitative relationship are not employees within the meaning of the Act.[25]

Our dissenting colleagues assert that the longstanding Board precedent we apply is contrary to a national policy that seeks to bring disabled workers into the mainstream of our economic society. They allege that this precedent relies on paternalistic stereotypes of the disabled. We, of course, fully embrace the national policy of inclusion, not outdated stereotypes. Our position, and the precedent on which it is based, is not, in fact, to the contrary.

First, and most importantly, our position does not exclude disabled people from the protections of the Act on the basis of their disabilities. We do not exclude these persons because of any assumption that they are incapable of engaging in the collective-bargaining process. We exclude these persons because of the nature of the relationship to the employer, and because Congress did not intend that the Act govern that relationship. If we had a case of disabled individuals whose relationship to an employer was primarily economic, we would be applying the full protection of the Act.

Similarly, disabled individuals who successfully complete their rehabilitation relationship can become employees of an employer and will be protected by the Act. Indeed, BAC provides a rehabilitative means for its clients to eventually enter into jobs in the mainstream of economic society. While the clients are in that rehabilitative program, the emphasis is on rehabilitation, so that the transition to regular employment can come about swiftly and effectively. The imposition of collective bargaining at the rehabilitative stage could interfere with the rehabilitation process itself, and thereby delay the day when the clients can enter into the mainstream of economic society. Given a long history of not injecting collective bargaining into the rehabilitation process, we are unwilling to suddenly change course and possibly place that process at risk.

To take cognizance of the effect that collective bargaining may have on a rehabilitation-services provider's ability to provide the best possible services to its disabled clients is not to act based on stereotypes. Applying the Act to primarily rehabilitative programs, as advocated by the dissent, may have the unintended effect of interfering with these federally mandated programs. Because collective bargaining could constitute a harmful intrusion on the rehabilitative purpose of those programs, assertion of the Board's jurisdiction would work at cross purposes to the programs that the dissent claims to be advancing.

Additionally, Congress is undoubtedly well aware of the Board's longstanding refusal to apply the statute to primarily rehabilitative work settings. Although Congress has not hesitated to correct the Board in the past when it has departed from applying the Act as Congress intended it, it has not done so here. "That it has not yet done so suggests that it is satisfied with the present state of affairs." *Cincinnati Assn. for the Blind v. NLRB*, supra, 672 F.2d at 572. See also *American Totalisator*, 243 NLRB 314 (1979), affd. 708 F.2d 46 (2d Cir. 1983), cert. denied 464 U.S. 914 (1983) (jurisdiction over dog racing tracks) ("[a]bsent an indication from Congress that the Board's refusal to assert jurisdiction is contrary to congressional mandate, we are not persuaded that we should exercise our discretion to reverse our prior holdings on this issue.").

Finally, our dissenting colleagues say that BAC's relationship with its disabled clients is not primarily rehabilitative, because they do the same work as nondisabled employees under the same supervision and for the same pay, are held to the same production standards, are sub-

[25] Contrary to the dissent, our decision today is also consistent with the Board's recent decision in *Alexandria Clinic*, 339 NLRB No. 162 (2003), which considered whether a union satisfied Sec. 8(g)'s 10-day strike notice requirement when it issued a 10-day notice, but deliberately delayed the start of the strike for 4 hours after the time specified in the notice. Sec. 8(g) contains detailed requirements for strike notices at healthcare facilities, and the Board properly relied on those explicit statutory provisions in concluding that the notice in *Alexandria Clinic* was deficient. Sec. 2(3), by contrast, contains no detailed provisions for determining statutory employee status. That issue, therefore, must be examined in the context of the Act's overall purpose.

ject to discipline for misconduct unrelated to their disability, and are not required to attend counseling or rehabilitation sessions. Our colleagues' position is unpersuasive on each point.

The Board has previously found the primarily rehabilitative standard was satisfied even where clients worked closely with nondisabled workers and shared common supervision, wages, and benefits, and similar working hours. See *Goodwill Industries of Tidewater*, supra. Significantly, in *Goodwill of Tidewater*, as here, employee status was not found even though the clients were subject to discipline in extreme cases, because the standard for discipline was fundamentally different and the emphasis was on counseling when problems arose.[26] Likewise, the Board found that the provision of counseling services similar to those provided by BAC was evidence of a primarily rehabilitative relationship without requiring proof that acceptance of those services was mandatory. [27]

On the other hand, the Board did rely on precisely the factors cited by the dissent as a basis for finding employee status in *Davis Memorial Goodwill*, supra and *Baltimore Goodwill Industries*, supra. Those findings were, of course, rejected by the D.C. and Fourth Circuit Courts of Appeals, respectively. Our dissenting colleagues cite no case in which the Board, with court approval, has found employee status on facts similar to those here. Our colleagues' apparent belief that such a finding would be embraced by a reviewing court here is contrary to the record in the courts.

Conclusion

For all the foregoing reasons, and because we find this case factually similar to the Board's prior decisions in *Goodwill of Tidewater* and *Goodwill of Denver*, we conclude that BAC's relationship with its disabled clients is primarily rehabilitative in nature and, therefore, that the disabled clients are not statutory employees. Accordingly, we remand this case to the Regional Director for further appropriate action consistent with this decision.

Dated, Washington, D.C. September 10, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN AND MEMBER WALSH, dissenting.

Modern Federal law and policy have moved steadily toward assuring disabled persons the same opportunities available to everyone else in our society, including the chance to participate fully in the workplace.[1] The most obvious expression of this trend is the Americans with Disabilities Act (ADA),[2] which has been reaffirmed by more recent legislative and Presidential initiatives.[3] This case presents the Board with the perfect opportunity to revisit longstanding precedent governing disabled workers[4] in light of a legal and policy landscape that has evolved dramatically in the last 15 years. We would abandon doctrines that were based on outdated notions about the place of the disabled in society. Sadly, the Board majority chooses to remain outside the mainstream. Our colleagues understandably bristle at that characterization, but it is accurate. By excluding disabled workers from the protections of the National Labor Relations Act because they may also receive rehabilitative services from their employers, the majority continues the needless segregation of those workers.

In this case, the Employer's disabled janitors easily meet the statutory definition of "employee." Section 2(3) of the Act provides that "[t]he term 'employee' shall include any employee." This definition "'reiterate[s] the breadth of the ordinary dictionary definition' of that term, so that it includes 'any person who works for another in return for financial or other compensation'"—the traditional common-law test of employee status. *NLRB*

[26] See also *Goodwill of Denver*, supra (same; disabled commissary workers who did not come to work or ate commissary food discharged).

[27] As to production standards, see fn. 20 supra.

[1] See Robert Silverstein, "Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy," Center for the Study and Advancement of Disability Policy, 85 Iowa L. Rev. 1691, 1695–1696 (2000); Jonathan C. Drimmer, "Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities," 40 U.C.L.A. L. Rev. 1341, 1379 (1993); Mark C. Weber, "Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act," 63 Md. L. Rev. 162, 173–174 (2004); see also Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (creating the Office of Disability Employment Policy in the Department of Labor to further the "objective of eliminating barriers to the training and employment of people with disabilities"); Office of the President, *New Freedom Initiative* (Feb. 2001) (reaffirming that a goal of federal policy is the realization of complete equality and full workplace and community integration for disabled individuals).

[2] 42 U.S.C. § 12101 et seq. (1990).

[3] See discussion in sec. II.B., infra.

[4] See *Goodwill Industries of Denver*, 304 NLRB 764 (1991), and *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991).

v. Kentucky River Community Care, Inc., 532 U.S. 706, 711 (2001) (quoting *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 90 (1995)). The Employer's disabled janitors fall well within this broad definition. They work 7 a.m. to 3:30 p.m., Monday through Friday, performing janitorial work for the Employer in exchange for an hourly wage.

The majority's decision to exclude the disabled janitors from the coverage of the Act is not a product of the statutory language. Rather, it is a product of the majority's rigid adherence to the Board's "typically industrial-primarily rehabilitative" analysis, a policy-based approach that the Board has used to rewrite the plain language of the Act, something that our colleagues have decried in other circumstances.[5]

Worse, the decision is bad policy. It means that the Employer's disabled workers have no protection under the Act. Not only have they been foreclosed from collective bargaining**,** they also have been exposed to discipline and discharge for engaging in protected concerted activity. Unlike their nondisabled coworkers, the Employer's disabled workers may be fired for even inquiring about their workplace rights. Far from integrating these disabled individuals into the workplace, the Board has segregated them, and many others like them, into second-class status.

Below, we address these points in greater detail. First, we show that the plain language of the Act requires a finding that the disabled janitors are "employees." Second, we explain why the majority's decision ignores that plain language, invades the legislative arena, and contravenes contemporary Federal policy regarding disabled workers. Last, we demonstrate that the majority's decision is flawed even on its own terms.

I. THE EMPLOYER'S DISABLED WORKERS ARE STATUTORY EMPLOYEES

Section 2(3) commands that "[t]he term 'employee' shall include any employee." There is no ambiguity. As noted by the Supreme Court, the "breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). The scope of Section 2(3) is circumscribed only by the narrowly defined categories of workers expressly exempted from the Act's coverage. See *Sure-Tan*, supra at 891–892. Accordingly, there are only two relevant questions: (1) are the Employer's disabled janitors "any employee[s]"; and (2) if so, are they nonetheless expressly exempted from the Act's coverage?

The Supreme Court has made clear that the first question is governed by the common-law agency doctrine of the traditional master-servant relationship. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995). Thus, an "employee" is one who performs services for another, under the other's control, and in return for compensation. See id. at 90–91, 93–95. Interpretation of the term in this manner comports with the ordinary dictionary definition of an "employee." See *Kentucky River*, supra, 532 U.S. at 711.

The second question recognizes that Section 2(3) expressly exempts several classes of workers from the Act's coverage: agricultural laborers, domestic servants, individuals employed by a parent or spouse, independent contractors, supervisors, and employees covered by the Railway Labor Act. An individual who falls into an excluded class is not covered by the Act, even though she otherwise meets the definition of "employee."

Applying these principles, it is clear that the Employer's disabled janitors are statutory employees because they easily come within the common-law meaning of the term "employee," and they are not specifically excluded from the Act's coverage.

A. Facts[6]

The Employer provides rehabilitation and support services to disabled persons. The focus here is on one of the Employer's vocational programs, the "NISH" program.[7] Pursuant to a NISH contract, the Employer, since March 1997, has provided janitorial services at the Cape Canaveral Air Station. The Employer's work force at the Station includes a project manager, an assistant project manager, a quality manager, a quality assistant, five nonsupervisory leadpersons, and approximately 60 rank-and-file workers. Typically, each leadperson is assigned a team of 8 to 12 workers, the majority of whom are disabled.

The disabled men and women who work for the Employer are, on average, 35 to 40 years old. Many are mentally disabled or have a mental illness, but others have only a physical disability, such as deafness (D&DE 10; Tr. 57–58).[8] The Employer does not provide the dis-

[5] See *Alexandria Clinic*, 339 NLRB No. 162 (2003).

[6] Citations to the Regional Director's July 27, 2000 Decision and Direction of Election are shown as "D&DE __." Citations to the transcript of the hearing are shown as "Tr. __."

[7] NISH, formerly known as the National Institute for the Severely Handicapped, is a Federal agency that assists nonprofit organizations to obtain contracts with the Government pursuant to the Javits-Wagner-O'Day Act (the JWOD Act). 41 U.S.C. § 46 et seq. Under the JWOD Act, the Government awards contracts to nonprofits through a noncompetitive bidding process. To qualify for such a contract, an employer must document that at least 75 percent of its nonsupervisory employees are individuals not capable of "independently obtaining and holding a job in a competitive work environment" at that time.

[8] Although the Employer's president and CEO, Dayle Olson, testified that the Employer maintains documentation that each disabled worker is "severely" disabled, Olson was unaware of the actual diagno-

abled workers with housing. Nor does the Employer provide the disabled workers with transportation to or from work. They all drive or take public transportation.

The Employer's disabled and nondisabled janitors work side-by-side. They earn the same hourly wage and benefits, and have the same working hours. The disabled and nondisabled janitors also work under the same supervision, and are subject to the same production and quality standards.[9] The disabled janitors are subject to discipline as well.[10]

Further, training and rehabilitation activities are not a regular or significant component of the disabled janitors' daily routine. The disabled janitors do not attend special classes during the day. Nor do they routinely leave work for medical or counseling appointments. The Employer provides a part-time trainer, but the training is limited to the performance of janitorial tasks, e.g. how to strip and wax floors. There also is a part-time mental health counselor available to the disabled janitors, but the disabled janitors are not required to meet with the counselor. Additionally, the Employer has arranged for the disabled janitors to receive assistance from "Circles of Care," a local provider of mental health and other services. CEO Olson claimed that the Employer also offers financial aid to disabled workers. However, Olson did not provide any specific evidence regarding the number of, or the extent to which, disabled workers use the mental health services or receive financial assistance (D&DE 8).[11]

B. Analysis

On these facts, the Act mandates a finding that the Employer's disabled janitors are statutory employees. First, they satisfy the ordinary definition of "employee." The disabled janitors perform services for the Employer, under the Employer's direction and control, in exchange for compensation, an hourly wage equivalent to that earned by their nondisabled coworkers.[12] Second, the disabled janitors do not fall within any of the categories of workers specifically exempted from the Act's coverage.[13] Accordingly, they are statutory employees.

ses for most of the disabled workers (D&DE 9-10). In addition, the Employer did not introduce the alleged documentation into evidence. Obviously, the Employer has a clear incentive to label as "severely disabled" as many of its workers as possible.

[9] The record contradicts CEO Olson's bare assertion, accepted by the majority, that the disabled janitors are not subject to the same production and quality standards as the nondisabled janitors. As far as production, Leadpersons Al Griffith, Linda Coelho, Valerie Smith agreed that the disabled janitors generally are assigned the same amount of work as the nondisabled janitors (Tr. 93, 108, 124), and that the disabled janitors do just as much work as the nondisabled janitors (Tr. 96–98, 115, 124-125). Not all the disabled janitors (or all the nondisabled janitors for that matter) work at the same pace, but the record shows that they all are expected to complete their assignments by the end of the day (Tr. 124–125). Moreover, to the extent the leadpersons check the disabled janitors' work more frequently than the nondisabled janitors' work, Leadperson Smith explained that the reason is simply that the nondisabled workers are more experienced and therefore know the job better (Tr. 124, 134–135).

Similarly, all the Employer's rank-and-file workers must meet the same quality standards. Leadperson Coelho testified, "They're required to do the same as I do, not just the nonhandicapped. Everybody out there cleans the same way" (Tr. 108). Leadperson Smith agreed that the disabled janitors "have to meet the same standards of work" (Tr. 123). As Smith explained, the Employer's Quality Assurance Manager inspects the employees' work and, if a building fails an inspection, then Smith directs the responsible employee, disabled or not, to redo the work (Tr. 130–131). CEO Olson actually corroborated Smith's account (Tr. 66–67). He characterized this as "part of the training of learning to be responsible" (Tr. 67). However, in Olson's view, the disabled janitors are engaged in "training" just by performing their routine job assignments, such as mopping floors (Tr. 60-61). Olson did not explain why the nondisabled janitors' performance of the same routine tasks apparently is just "work."

[10] There is no dispute that the Employer would not discipline an employee for a disability-related behavior. See Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. Instead, the staff attempts to ascertain the behavior's cause, after which the Employer endeavors to provide the appropriate corrective action (e.g., medication adjustment). However, the record is clear: the disabled janitors *are* subject to discipline for behavior that is unrelated to their disabilities. Olson himself drew this distinction with the following example: "If you're just sleeping in because you don't want to come to work, that's different than not being able to get up because my medication isn't working" (D&DE 9; Tr. 64).

[11] The majority asserts that Circles of Care assists the disabled workers in such daily-living activities as shopping, meal planning, and the payment of bills. In fact, Olson merely "guessed" that this was the case and was unable to provide a specific basis for his guesswork (D&DE 8 fn. 15).

[12] Notably, the Internal Revenue Service utilizes the same common law test to determine whether disabled individuals who are working in sheltered workshops are 'employees' for Federal employment tax purposes. See Rev. Rul. 65-165, 1965-1 C.B. 446 (1965). Moreover, the Service has generally concluded that, once such disabled individuals have completed any initial training period, they are employees for Federal employment tax purposes while they are working in the sheltered environment awaiting placement in regular employment. See id.; Priv. Ltr. Rul. 9809831 (Feb. 27, 1998), and Priv. Ltr. Rul. 9804023 (Jan. 23, 1998); but see Prv. Ltr. Rul. 9417008 (Apr. 29, 1994) (disabled participants in sheltered workshop program were not employees where they earned subminimum wages, did not support themselves with their earnings, and the services they performed did not displace regular employees).

[13] The majority points out that "managerial employees" are not considered to be statutory employees, even though they are not expressly exempted from Sec. 2(3). The analogy is flawed for two reasons. First, managerial employees represent a special category of workers for which there exists express legislative history indicating Congress' intent to exclude them from the Act. Indeed, the Supreme Court has held that the legislative history of the 1947 Taft-Hartley amendments indicates that managerial employees were "regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283 (1974). There simply is no comparable legislative history regarding disabled workers employed in vocational rehabilitation programs. Second, as the Court observed in *Bell Aerospace*, the *reason* Congress did not intend the Act to cover managerial employees is that it would "eviscerate the tradi-

This conclusion follows the statutory language and is consistent with the principle that economic activity need not be the sole, or even dominant, purpose of a cognizable employment relationship. The majority errs in asserting that, "if the relationship is not primarily an economic one, then the Act is not intended to apply." All the Act requires is that there be *an* economic aspect of the relationship. Compare *Seattle Opera Assn.*, 331 NLRB 1072, 1073 (2000), certification affd. 292 F.3d 757 (D.C. Cir. 2002) (paid auxiliary choristers in community opera were statutory employees, notwithstanding that their purpose in singing was primarily for personal pleasure and satisfaction as opposed to earning a living) with *WBAI Pacifica Foundation*, 328 NLRB 1273, 1274 (1999) (unpaid radio station staff were not statutory employees in absence of "at least a rudimentary economic relationship"); see also, e.g., *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (paid union organizers are statutory employees, even though their primary purpose is to organize the employer's workers)**;** *Brown University*, 342 NLRB No. 42, slip op. at 11 (2004) (Members Liebman and Walsh, dissenting). Therefore, where Board precedent speaks of a "*fundamentally* economic relationship," see, e.g., *WBAI Pacifica*, supra at 1275, it means only that the relationship must have at least a *basic* economic component, not necessarily a *primary* one. Thus, even assuming that the Employer's disabled janitors actually receive rehabilitation services from the Employer, they still are Section 2(3) employees.

Finding the disabled janitors to be statutory employees *does* serve the overall purposes of the Act. As the majority acknowledges, the Act "was designed to protect 'laborers' and 'workers.'" *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 284 (1974). The Employer's disabled janitors, the supposed "clients," work 40-hour weeks cleaning toilets and floors and performing other janitorial work at the Employer's direction in exchange for an hourly wage. They are workers.

Significantly, moreover, the disabled janitors actually are experiencing the same "conflicting interests" present in what the majority calls "primarily economic employment relationships." In questioning Union President Hunt about how collective bargaining might benefit them, the disabled janitors asked whether the Union could negotiate for more full-time positions, whether the Union could bargain for better health insurance, and whether the Union could obtain mileage reimbursement for employees who used their personal vehicles at work (Tr. 145). Needless to say, these interests mirror those routinely in conflict between management and labor generally.[14]

For all of these reasons, the Employer's disabled janitors are statutory employees.

II. THE MAJORITY'S DECISION IGNORES THE PLAIN LANGUAGEOF THE ACT, INVADES THE LEGISLATIVE ARENA, AND CONTRAVENES CONTEMPORARY FEDERAL POLICY

Nevertheless, the majority says the Employer's disabled janitors are not "employees," without truly reconciling Supreme Court precedent confirming the plain, common-law meaning of the statutory language or pointing to any pertinent legislative history. Instead, the majority adheres to an outdated policy-based approach, the "typically industrial-primarily rehabilitative" analysis. Applying this analysis, the majority concludes that the disabled janitors are not employees because their relationship with the Employer is primarily rehabilitative. The majority's analysis is impermissible under the Act and is flawed on its own terms.

A. The "Typically Industrial-Primarily Rehabilitative" Analysis Has No Basis in the Statute

The "typically industrial-primarily rehabilitative" framework has no foundation in the Act. Section 2(3) simply contains no exemption based on an employee's receipt of rehabilitative assistance from his employer. Further, the evolution of the typically industrial-primarily rehabilitative model confirms that it was never intended to determine disabled workers' status under Section 2(3). The earliest Board cases involving sheltered workshops actually took for granted that the disabled workers were statutory employees. See, e.g., *Sheltered Workshops of San Diego, Inc.*, 126 NLRB 961 (1960) (assuming that disabled workers were statutory employees but declining to assert jurisdiction over *the employer* because of its dominant charitable purpose).

In later cases, the Board turned its attention to the manner and extent to which the rehabilitative aspects of the employer's relationship with its disabled workers distinguished the relationship from the typical employment relationship. But, even then, the Board did not purport to exclude the disabled workers from Section

tional distinction between labor and management." 416 U.S. at 284. Plainly, this concern is not implicated here, where the danger lies not in blurring the line between labor and management but in creating "a subclass of workers without a comparable stake in the collective goals of their [non-disabled] co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

[14] See, e.g., *SEIU, Employers Grapple With Health Care In Talks on Contract for 4,000 D.C. Janitors*, Daily Labor Report, Apr. 24, 2003, at A-6; *Elizabeth Walpole-Hofmeister, UPS Obligated to Create 2,000 Full-Time Jobs Under 1997 IBT Agreement, Arbitrator Rules*, Daily Labor Report, Feb. 18, 2000, at A-1.

2(3) coverage. In *Goodwill Industries of Southern California*, 231 NLRB 536 (1977), for instance, the Board exercised its discretion not to assert its statutory jurisdiction where, among other things: the employer's focus was rehabilitating and preparing clients for work in private industry, rather than producing a product for profit; the employer eschewed discipline of the clients; and the employer provided the clients with medical, social, and legal counseling services. Id. at 537. The Board still assumed the clients were statutory employees, but exercised its discretion not to assert jurisdiction over the employees out of fear that collective bargaining would impede the employer's rehabilitative objectives. Id. at 538.[15]

Subsequently, in a series of cases involving blind and visually-impaired workers, the Board distinguished *Goodwill of Southern California* and asserted jurisdiction, but dramatically shifted its analytical framework. See *Cincinnati Assn. for the Blind*, 235 NLRB 1448 (1978), certification affd. 244 NLRB 1140 (1979), enfd. 672 F.2d 567 (6th Cir. 1982), cert. denied 459 U.S. 835 (1982); *Lighthouse for the Blind of Houston*, 244 NLRB 1144 (1979), certification affd. 248 NLRB 1366 (1980), enfd. 696 F.2d 399 (5th Cir. 1983); *Arkansas Lighthouse for the Blind*, 284 NLRB 1214 (1987), enf. denied 851 F.2d 180 (8th Cir. 1988). Rather than relying on the characteristics of the employer's relationship with its blind workers to decide whether, in its discretion, to assert jurisdiction over the workers, the Board, without explanation, cited these same factors for the purpose of resolving whether it had statutory jurisdiction in the first instance; that is, whether the blind workers were "employees." See *Lighthouse for the Blind of Houston*, 244 NLRB at 1147; *Arkansas Lighthouse*, 284 NLRB at 1216.

The Board completed the unexplained conversion of the "typically industrial-primarily rehabilitative" analysis from a test for deciding when to exercise its discretionary jurisdiction to a determinant of whether disabled workers were statutory employees at all in *Goodwill Industries of Denver*, 304 NLRB 764 (1991), and *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991)—the cases underlying the Board's decision today. In those decisions, involving union attempts to represent disabled workers, the Board announced that its assessment of the propriety of the unions' petitions would rest entirely on the determination of whether the disabled clients were employees within the meaning of the Act. *Goodwill of Denver*, 304 NLRB at 765; *Goodwill of Tidewater*, 304 NLRB at 767.[16]

The Board thus proceeded to assess the Section 2(3) status of the disabled workers on the basis of the characteristics of their relationship with their employers. In doing so, the Board for the first time articulated the standard that had evolved over the course of several decades of decisional law: If an employer's relationship with its disabled workers is guided primarily by business considerations, such that it can be characterized as "typically industrial," the workers will be found to be statutory employees; alternatively, if the relationship is "primarily rehabilitative" in nature, the individuals will not be found to be employees. *Goodwill of Denver*, 304 NLRB at 765; *Goodwill of Tidewater*, 304 NLRB at 768. But the Board still did not explain how the standard could be used to supplant the plain language of the Act, or why.

The upshot is that the Board avoided Section 2(3) using a framework that has no basis in the language of the Act and that developed purely as a guide to the Board's exercise of its assertion of discretionary jurisdiction over employers of disabled workers and, later, over the disabled workers themselves. This was error then, and it is error today. It is now clear, in light of the plain language of Section 2(3) and recent Supreme Court precedent, that there is no legitimate basis for excluding from the broad scope of Section 2(3) disabled workers based solely on their participation in rehabilitative activities. Accordingly, we would overrule *Denver* and *Tidewater*.

Finally, it is significant that the "typically industrial-primarily rehabilitative" standard has proven to be unworkable and unpredictable, leading to different outcomes in seemingly similar cases.[17] This, in turn, has led

[15] Specifically, the Board stated:

> This unusual employer-client relationship presents us with that rare, possibly nonrecurring, instance where an employer's concern for the welfare of his employees competes with, and in some sense displaces, the union's ordinary concern of employee well-being. . . . To permit collective bargaining in this context is to risk a harmful intrusion on the rehabilitative process by the Union's bargaining demands. . . . The collective-bargaining process, in short, is likely to distort the unique relationship between Employer and client and impair the Employer's ability to accomplish its salutary objectives.

Id. at 537–538.

[16] In *Goodwill of Denver*, the Board made clear that, to the extent *Goodwill of Southern California* suggested that the Board would decline to assert jurisdiction over particular employees solely because of their employer's "worthy rehabilitative purpose," it was no longer good law. 304 NLRB at 765 fn. 7.

[17] The Board's application of the standard focuses on several factors, including: the existence or absence of employer-provided counseling, training, or rehabilitation services; the existence or absence of production standards; the extent to which, and manner in which, the employer metes out discipline; the applicable terms and conditions of employment in comparison to those of nondisabled individuals employed at the same facility); and the average tenure of employment, including the existence of a job-placement program. Nevertheless, the weight accorded each factor and the appropriate balance among them is not readily discernible, as evidenced by the fact that application of the test has

to criticism from the courts of appeals,[18] confirming our belief that the better approach here is to simply apply the statute as written.

B. Rewriting Section 2(3) to Exclude Disabled Workers Is a Policy Step for Congress and One that Congress Almost Certainly Would Not Take

This is the second time in recent weeks that the majority has unjustifiably denied a group of workers the right of self-organization. See *Brown University*, 342 NLRB No. 42 (2004). As we pointed out in *Brown*, absent compelling indications of Congressional intent, the Board may not create an exclusion from the Act's coverage for a category of workers who satisfy the statutory definition of employee.

In *Brown*, we found guidance in the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), where the Court considered whether university faculty members at one institution were managerial employees and so excluded from the Act's coverage. The Court observed that it could not

> decide this case by weighing the probable benefits and burdens of faculty collective bargaining. That, after all, is a matter for Congress, not this Court.

444 U.S. at 690 fn. 29 (citation omitted).

Significantly, other federal courts have been similarly unwilling "to 'second guess' Congress on a political and philosophical issue" in cases directly relevant to the present one. *Cincinnati Assn. for the Blind v. NLRB*, 672 F.2d 567, 571 (6th Cir. 1982), cert. denied 459 U.S. 835 (1982) (refusing to find exception to Section 2(3) of the Act for disabled workers of a sheltered workshop); *NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399, 404 fn. 21 (5th Cir. 1983) (rejecting contention that Board lacked jurisdiction over disabled employees of sheltered workshop).[19]

The majority nevertheless effectively creates an exemption in Section 2(3) for disabled workers in vocational rehabilitation programs. At bottom, the majority's rewriting of Section 2(3) results from its view that the disabled individuals here are not really "working." The majority's overreaching is even more ill-advised because denying these disabled workers the freedom to decide for themselves whether they desire collective bargaining—an opportunity regularly afforded nondisabled workers, including those who work alongside the disabled employees here—contravenes contemporary federal policy to eliminate the barriers to disabled workers' full participation in the workplace.

Contemporary federal policies aim to give disabled workers the same opportunities available to all others in the workplace. In enacting the ADA, supra, Congress specifically found, among other things, that:

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. § 12101(a)(7). In an effort to eradicate those "stereotypic assumptions," Congress banned discrimination against disabled individuals in various settings, including the workplace. See id. at § 12112. In recent years, Congress and successive Presidential administrations have reaffirmed the objectives underlying the ADA and have taken further steps toward the attainment of those objectives.[20]

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produced different outcomes in seemingly similar cases. Compare *Goodwill of Denver*, supra (finding that disabled workers were not statutory employees, as a result of their "primarily rehabilitative" relationship with the employer), and *Goodwill of Tidewater*, supra (same), with *Davis Memorial Goodwill Industries*, 318 NLRB 1044 (1995), certification affd. 320 NLRB No. 151 (1996), enf. denied 108 F.3d 406 (D.C. Cir. 1997) (finding disabled workers to be statutory employees, as their relationship with the employer was guided by business considerations).

[18] See, e.g., *Baltimore Goodwill Industries v. NLRB*, 134 F.3d 227 (4th Cir. 1998) (criticizing the Board for failing to adequately distinguish its decision from *Goodwill of Tidewater and Goodwill of Denver); Davis Memorial Goodwill Industries v. NLRB*, 108 F.3d 406 (D.C. Cir. 1997) (same).

[19] The majority says these cases "provide no support" for the conclusion that statutory employee status exists even where an employer-employee relationship is primarily rehabilitative. The majority is wrong. In *Cincinnati Assn. for the Blind*, supra, the Sixth Circuit expressly *rejected* the employer's argument that Congress intended to exclude from the coverage of the Act disabled individuals employed in sheltered workshops. 672 F.2d at 571–572. Accordingly, the court refused to "carve out an exception to the plain language of Section 2(3)" for *any* sheltered workshop, regardless of its therapeutic nature. Id. To be sure, the court went on to review the Board's application of the typically industrial-primarily rehabilitative analysis, but the court made clear that it was simply deferring to the Board's "policy," to the Board's "discretion," to "*present Board practice*." Id. (Emphasis added.) Thus, the case fully supports our position that Sec. 2(3) confers statutory jurisdiction over all disabled employees of sheltered workshops. See also *Lighthouse for the Blind of Houston*, supra at 404 fn. 21 (agreeing with the Sixth Circuit that no exception in the Act applies to the employer-employee relationship between a sheltered workshop and its workers)

[20] In 1999, Congress passed the Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIA), which seeks to improve access to, and choices among, vocational training and placement services. See 42 U.S.C. § 1320b-19 et seq. On March 13, 1998, President Clinton issued Executive Order No. 13078, establishing the "National Task Force on Employment of Adults with Disabilities." He charged the

Clearly, guaranteeing equal treatment and opportunities for disabled persons in the workplace is a fundamental objective of contemporary federal policy. And it is equally clear that the Board's use of the "typically industrial-primarily rehabilitative" framework to deny the Employer's disabled workers their Section 7 rights runs counter to this policy. Indeed, the "typically industrial-primarily rehabilitative" framework is rooted in the same dated, stereotypical assumptions about the disabled that contemporary federal policy seeks to undo.

In *Goodwill Industries of Southern California*, supra, the Board observed that the rehabilitative work environment presents a situation in which the "employer's concern for the welfare of his employees competes with, and in some senses displaces, the union's ordinary concern for employee well-being." 231 NLRB at 537. The Board expressed concern that "[t]he collective-bargaining process, in short, is likely to distort the unique relationship between Employer and client and impair the Employer's ability to accomplish its salutary objectives." Id. at 537–538.[21]

The Board's concerns were questionable at the time and, today, they are certainly unnecessarily paternalistic and the product of stereotyped thinking. We should take this opportunity to recognize that disabled workers are capable of evaluating the merits of union representation, and to shed the perception of disabled individuals as being "different from and inferior to nondisabled people."[22] Advocacy groups, policymakers, and disabled workers themselves have long fought to dispel this perception, but the majority rejects their appeals.[23]

The notion that collective bargaining is not well suited to the rehabilitative environment is unfounded. There is no inherent incompatibility between the rehabilitative process and collective bargaining. See *NLRB v. Lighthouse for the Blind of Houston*, supra, 696 F.2d at 407 ("[t]here is no Congressional policy that collective bargaining is totally inconsistent with rehabilitative activity"). Indeed, the collective-bargaining process is suitable for, and may be successfully adapted to, the rehabilitative work environment.[24] The majority's rhetoric about the "risk" of collective bargaining interfering with the "rehabilitation process itself" is not only unfounded, it also smacks of the same stereotypical, paternalistic thinking underlying *Goodwill of Southern California*: "[t]he collective-bargaining process, in short, is likely to distort the unique relationship between Employer and client and impair the Employer's ability to accomplish its salutary objectives." 231 NLRB 536, 537–538 (1977).

Indeed, there is every reason to believe that participating in a representation election or collective bargaining likely would have significant rehabilitative benefits for disabled workers intent on joining or rejoining the general labor market. Disabled employees of sheltered workshops are supposed to learn decision-making and interpersonal skills in addition to basic job skills. The process of learning about and evaluating the advantages and disadvantages of union representation and collective bargaining involves these skills. Should such employees actually select union representation, they might achieve even greater gains by participating in bargaining, grievance processing, and internal union governance.

Finally, while the majority seeks to explain how preventing disabled workers from organizing a union will aid their rehabilitation, it never explains why permitting them to be fired for their efforts is also beneficial. That, too, is a result of holding that the workers are not statutory employees.

III. THE MAJORITY'S ANALYSIS IS FLAWED ON ITS OWN TERMS

Even applying the "typically industrial-primarily rehabilitative" analysis, the majority's decision is undermined by its failure to critically assess the record.

A. The Burden of Proof

A party seeking to exclude an otherwise eligible employee from the coverage of the Act bears the burden of

Task Force with creating "a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population." In February 2001, President George W. Bush announced the "New Freedom Initiative," a compilation of proposals designed to foster the realization of complete equality and full workplace and community integration for disabled individuals. Office of the President, *New Freedom Initiative* (Feb. 2001); see also Office of the President, *New Freedom Initiative, A Progress Report* (Mar. 2004).

[21] Although the Board has overruled *Goodwill of Southern California* to the extent that it held that the Board can decline to assert jurisdiction over disabled workers based solely on their employer's "worthy" purpose, the Board has continued to adhere to the underlying rationale of that case as the basis for finding that disabled workers in "primarily rehabilitative" relationships are not "employees".

[22] Fred Pelka, "The ABC–CLIO Companion To The Disability Rights Movement," 283 (1997) (reviewing criticisms of sheltered workshops as being, among other things, "'one of the last bastions of therapeutic paternalism facing people with disabilities'").

[23] The disabled janitors' ability to evaluate the merits of union representation is demonstrated by their questions to Union President Hunt about how collective bargaining might benefit them, discussed above. These are the same questions any nondisabled worker might ask a prospective collective-bargaining representative.

[24] See generally *Boston Medical Center*, 330 NLRB 152, 165 (1999) (finding medical house staff to be statutory employees and observing, "If there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our economy").

establishing a justification for the exclusion.[25] Accordingly, it was the Employer's burden to justify denying its disabled janitors employee status. Contrary to the majority's conclusion, the Employer failed to carry its burden.

B. The Employer Failed to Establish that Its Relationship with Its Disabled Janitors Is Primarily Rehabilitative

The Employer did not establish that its relationship with its disabled janitors is more primarily rehabilitative than typically industrial. What the record actually shows is that the Employer's relationship with its disabled janitors is typical of its relationship with its nondisabled janitors, whom no one disputes are statutory employees:

> (1) the disabled janitors perform the same tasks, under the same supervision, and for the same hourly wage, as the non-disabled janitors;
>
> (2) the disabled janitors are expected to complete their work assignments to the same extent as, and perform to the same level of quality as, the non-disabled janitors;
>
> (3) the disabled janitors are subject to discipline for misconduct unrelated to their disabilities; and
>
> (4) the Employer neither requires the disabled janitors to attend any counseling or rehabilitation sessions, nor provides them with any paid leave beyond that provided to non-disabled janitors to attend medical or other appointments.

Accordingly, even under current precedent, the Employer has failed to justify excluding the disabled janitors from the coverage of the Act.

IV. CONCLUSION

The plain language of the Act, recent Supreme Court precedent, and modern federal policy lead inescapably to the conclusion that the Employer's disabled workers are statutory employees. Rather than allowing the Employer's disabled workers to decide for themselves whether collective bargaining is desirable, the majority decides for them—and for every disabled worker in a rehabilitation program. The majority's assurance that it would apply the full protection of the Act, "[i]f we had a case of disabled individuals whose relationship to an employer was primarily economic," is illusory. As demonstrated here, the majority is unlikely to find such a relationship. The majority thus relegates the Employer's disabled janitors and all similarly-situated workers to the economic sidelines, making them second-class citizens both in society and in their own workplaces.

Because we regard disabled workers *as* workers, and nothing less, we dissent.

Dated, Washington, D.C. September 10, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[25] See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001) (party seeking to exclude alleged supervisors bears burden of proof); *Montefiore Hospital and Medical Center*, 261 NLRB 569, 572 fn. 17 (1982) (party seeking to exclude alleged managers must "come forward with the evidence necessary to establish such exclusion"); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (independent contractors); *AgriGeneral, L.P.*, 325 NLRB 972 (1998) (agricultural employees).